

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DAVID NOLAN,

Plaintiff,

Case No: 18-012325-CB

Hon. Brian R. Sullivan

-vs-

RONALD THOMAS, an individual,
and THOMAS NOLAN, LLC, a
Michigan limited liability company

Defendants.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City
County Building, City of Detroit, County of
Wayne, State of Michigan, on
6/7/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

The question presented in this case is whether the plaintiff's cause of action is barred because it was, or could have been, previously litigated in a prior federal court case. The court concludes it is barred. The court further holds while Thomas Nolan, LLC (a defendant in state court litigation only) is a new party, it is in privity with defendant Thomas of the federal suit, and res judicata and collateral estoppel preclude this suit against that party in this case.

FACTS

Plaintiff David Nolan (Nolan) sued Ronald Thomas (Thomas) and Thomas Nolan, LLC (defendants) in the Third Circuit Court for breach of contract, breach of fiduciary duty, violations of the Michigan Uniform Partnership Act, fraud, constructive fraud and unjust enrichment. Plaintiff filed essentially the same case against Thomas in the United States District Court for the Eastern District of Michigan, Southern Division. That case was dismissed on summary disposition after about two years of litigation. That prior suit precludes this suit.

Nolan and Thomas' relationship began in July, 2015 when they met in Las Vegas, Nevada. Nolan is from Australia. Thomas proposed a business operation identifying the roles to be undertaken by each of the two parties. Nolan said the parties intended to set up an LLC and use Rise Above Asset Management, LLC, registered under the name of Thomas Nolan, LLC. On October 19, 2015 Rise Above name was changed to Thomas Nolan. The parties never signed an operating agreement. Each member was expected to contribute an initial contribution of \$7,000.00. Thomas claims Nolan only contributed a little over \$4,000.00. From September, 2016 through April, 2016 the parties operated a business of buying, selling and renting real estate. In February, 2016 Nolan enticed a third party investor to put in \$150,000.00 Australian dollars into the business and the parties pursued the completion of an operating agreement.

At the end of March, 2016 Thomas complained of the apparent inequities in the respective contributions to the business. Thomas requested an additional \$11,000.00 capital contribution but Nolan did not make it.

On May 13, 2016 Thomas suggested they dissolve the business relationship and enter an agreement for defendant to buy plaintiff's share. Plaintiff demanded repayment of his investment and equity earned in the business. The parties did not agree.

Nolan filed suit against Ronald Thomas, a Michigan resident, in the United States District Court, Eastern District of Michigan on June 16, 2016. On March 27, 2017 Nolan's first amendment of his complaint alleged counts of breach of contract, breach of fiduciary duty, violation of the Michigan Uniform Partnership Act, fraud, constructive fraud and unjust enrichment. Plaintiff's proposed amendment also had one count of conversion, but the court denied that count as futile.

The gravamen of both complaints was that in October, 2015 Nolan agreed to invest money with Thomas to rehabilitate and resell real property but Thomas eventually barred him from both the benefits of, and access to, their jointly created business. Nolan also alleged he was wrongly deprived of his membership interest in the LLC by Thomas. Nolan sought an order of the federal court declaring him to be a member of the LLC, that Thomas breached his duties to Nolan, that Nolan was entitled to full access to the books, records, assets, and income of the LLC.

The court eventually appointed a receiver over the properties owned by the parties or enterprise.¹

Cross motions for summary disposition motions were filed about April 20, 2018. The federal court concluded the plaintiff had standing to sue, but also found no partnership between Nolan and Thomas because an LLC existed which conducted their business. The court also denied plaintiff's motion to again amend his complaint to allege violations of the Michigan Limited Liability Company Act.

On June 26, 2018 the court issued an opinion and order and granted defendant's summary disposition. Plaintiff's counts of breach of contract of former partnership, breach of fiduciary duty owed in a partnership, violation of the Michigan Uniform Partnership Act and all plaintiff's fraud claims, concluding plaintiff did not carry his burden of proof that any statements made by Thomas were intentionally false or that Nolan relied upon them were dismissed. The court also granted defendant's motion as to plaintiff's counts of unjust enrichment and promissory estoppel. The court stated in its opinion: "None of the claims asserted in this action survive summary judgment." (Opinion, page 33).²

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During the oral argument on the summary motion plaintiff orally moved to amend his complaint (and later filed a written motion for leave to amend the complaint) to assert

¹The receiver submitted his final report on November 20, 2017.

claims under the Michigan Limited Liability Company Act. The court found plaintiff's delay in seeking the amendment was excessive and further found defendants would be prejudiced by allowing a late amendment after two years of litigation. (See page 32, District Court Opinion).³

Shortly after the court dismissed that case, plaintiff filed an action in the state court. This court granted summary disposition on January 24, 2019 on the basis of res judicata and collateral estoppel. The plaintiff amended the complaint shortly thereafter. Defendant now brings a second motion for summary disposition claiming that the actions in the amended complaint are barred by the federal court decision.

Plaintiff has not alleged any new facts in this (second state court) case which give rise to any new causes of action. Everything alleged by plaintiff was, or could have been, brought in the federal case. Nolan alleges Thomas diverted real property, holdings, profits and other income to himself in violation of his duty to Nolan, wrongfully diverted business opportunities which belonged to the business to himself, used personal partnership and assets and business relationship for illegitimate purposes, froze the plaintiff out of the business and wrongfully used the money, all in violation of his fiduciary duty and to Nolan's detriment. Included in those acts were unilaterally closing the business and using funds for personal reasons.

²Plaintiff did not appeal that ruling.

³Plaintiff filed a motion for reconsideration of that ruling.

In support of these contentions the plaintiff cites the June 26, 2018 opinion of the district court, where the court noted:

“To be fair, plaintiff’s accountant does appear to have identified irregularities in defendant’s management of Thomas Nolan, LLC’s bank account. The receiver and plaintiff’s accountant agree that Thomas Nolan, LLC repaid two loans to defendant’s wife and the personal friend despite no evidence of the loan funds ever having been deposited in the company’s bank account. Similarly, defendant made two withdrawals of funds ‘wrongfully deposited in this account’ even though there is no record of the initial wrongful deposit. However, this conduct is not fraud as defined by the Michigan courts. It may violate the duties owed by an officer an LLC to the shareholders or investors, but there is no such claim in this case.” (Opinion, page 21).

On August 27, 2018 the district court granted the receiver’s final report, terminated the receivership, approved the accounts of the receiver and discharged the receiver. It also distributed the remaining assets to the LLC and barred post receiver claims.

After the receiver was discharged the court returned the parties to “presuit status” and the assets were conveyed to Nolan Thomas, LLC. (See paragraphs 5 and 6 of the August 27, 2018 order of the district court granting receiver’s final report, to terminate the receivership and distribute proceeds). In response to the receiver’s petition to close the estate plaintiff requested the court order the receiver return \$22,477.95 cash to plaintiff with the assets to be “jointly held and administered by Nolan and Thomas jointly as members of Thomas Nolan, LLC.

Plaintiff did not appeal the June 26, 2018 court order for summary disposition or reconsideration. Judgment was entered for defendant and the case dismissed with

prejudice.

Plaintiff contends that this suit is not barred because the US District court returned the parties to “presuit status” and he should be free to litigate the claim in the State court. Plaintiff alleged counts of oppression of member rights, breach of fiduciary duties owed to a member of an LLC and an accounting.

STANDARD OF REVIEW

MCR 2.116(C)(7)

MCR 2.116(C)(7) states:

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based: (7) entry of judgment, dismissal of the action, or other relief is appropriate because of ... prior judgment ... or other disposition of the claim before commencement of the action.

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions or other documentary evidence. The court must consider such material that is submitted to it. See MCR 2.116(G)(5). The substance or content of any supporting evidence must be admissible in evidence. A party is not required to file supportive material, but is allowed to file such material. The contents of the complaint are accepted as true unless contradicted by documentations submitted by the movant. See *Maiden v Rozwood*, 461 Mich 109, at 119 (1999); *Patterson v Kleiman*, 447 Mich 429 (1994).

MCR 2.116(C)(8)

A motion under 2.116(C)(8) tests the legal sufficiency of the complaint. All well pled allegations are accepted as true. They are construed in a light most favorable to the non-moving party. See *Maiden v Rozwood*, 461 Mich 109 (1999); *Wade v Department of Corrections*, 439 Mich 158 (1992). A motion under (C)(8) may be granted only where the claims alleged are so “clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade*, at 163. A court considers only the pleadings when considering a (C)(8) motion. MCR 2.116(G)(5).

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra*. Under this sub-section the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties. See *Maiden, supra*; MCR 2.116(G)(5). Such evidence must be considered in a light most favorable to the party opposing the motion. If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10)(G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

When a motion is brought under sub-rule (C)(10) the adverse party may not rest on mere allegations or denials of the pleadings but must, by affidavits, or as provided for in the rules set forth specific facts demonstrating a genuine issue for trial. If the adverse party fails to respond judgment shall be entered against him or her. A litigant’s pledge to

establish an issue of fact cannot survive summary disposition under (C)(10). *Maiden, supra*. A review in court under (C)(10) must consider the substantively admissible evidence proffered in opposition to the motion. A promise to produce evidence is insufficient under the court rule. *Maiden, supra*.

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel is applicable under MCR 2.116(C)(7). See *Lichon v American Universal Insurance Company*, 435 Mich 408,427 (1990); *Alcona Company v Wolverine, Inc.*, 233 Mich App 238 (1998). The evidence must be taken in the light most favorable to the non-moving party.

Res Judicata is employed to prevent multiple suits which litigate the same cause of action. See *Adair v State of Michigan*, 470 Mich 105,121 (2004). This doctrine bars a second or subsequent suit when: 1) the prior action was decided on the merits; 2) both actions involved the same parties or their privies, and 3) the matter in the second case was, or could have been, resolved in the first. *Adair, supra*, at 121; *Sewell v Clean Cut Mgt., Inc.*, 463 Mich 569 (2001).

The Michigan Supreme Court has taken a broad approach to the doctrine of res judicata. The broad approach holds that the doctrine bars not only claims that have been litigated, but also every claim arising from the same transaction that the parties, exercising

reasonable diligence, could have raised, but did not. See *Dart v Dart*, 460 Mich 573 (1999).

DISCUSSION

Applying the principles of res judicata to *Nolan*, the court concludes Nolan filed a prior suit in the federal court which was decided on the merits after two years of litigation. The prior federal case did not have Nolan Thomas, LLC as a party. Nolan moved to amend the complaint to add a count about the LLC in federal court, but that motion was denied. The question is whether Thomas and Nolan Thomas, for purposes of res judicata, are the same party or in privity.

Privity is defined in its broadest sense as “mutual or successor relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. *Phinisee v Rogers*, 229 Mich App 547,553 (1998); *Sloan v Madison Heights*, 425 Mich 288 (1986).

Adair, Id addressed the issue of privity. To be in ‘privity’ means to be so identified in interest with another party that the first litigation would represent the same legal right the later litigant is trying to assert. See *Baraga Co. v State Tax Comm.*, 466 Mich 264 (2002). A perfect identity of parties is not required. However, there must be a substantial identity of interests that are adequately presented and protected by the first litigant. *Adair, supra*, at 122. The outer limits of the doctrine of privity traditionally required a substantial identity of

interest and a working functional relationship “in which the interests of the non-party are presented and protected by the party in litigation.” *Baraga*, at 456; *Phinisee v Rogers*, 229 Mich App 547 (1998).

For there to be privity between a party and a non-party (Thomas and Nolan Thomas, LLC) there must be a substantial identity of interest and a working or functional relationship in which the interests of the non-party LLC have presented and/or protected by Thomas, the defendant in the federal case. *Phinisee*, Mich App at 553-554.

There are instances where successive parties are not in privity (such as a child and mother who was a party in a paternity action, etc. Those two persons have different interests to protect.) In this case, Nolan Thomas, LLC and Thomas have virtually identical interests in the lawsuit. The same claims presented against Thomas are those plaintiff seeks to present against the LLC. Finally, whether or not the claims were actually presented or the LLC a party to the suit, both could have been adjudicated in the federal case. This is a bar to presenting those claims in this Circuit Court action under res judicata.

The court concludes that Nolan Thomas, LLC is in privity with defendant Thomas. The predicate facts giving rise to the cause of action in the first federal case, the amended complaint, the proposed amended complaint in the Federal Court, and the original suit and second suit filed in Wayne Circuit all involve the same fundamental transaction and the

same persons.

Defendant Thomas protected those interests in the defense of the first suit. Neither defendant should be required to re-litigate the same issues that were previously litigated in the federal court. The addition of the LLC in this second case does not change that outcome. See *Peterson Novelties, Inc. v City of Berkley*, 259 Mich App 1 (2003). (The owner of the company and a member of it are in privity).

In its opinion of summary disposition, the Federal Court acknowledged the potential misuse of funds and potential inappropriate payments by defendant, and ultimately concluded only that they were not recoverable under the legal theory of fraud. From that ruling it does not follow that the defendant acted properly (or not) in his dealings with the business. Rather, the court simply held that the plaintiff failed to prove the elements of fraud.

The plaintiff's failure to receive the \$22,000.00 was also addressed by the Federal Court in plaintiff's motion as to the final receiver order.

Finally, the District Court addressed and decided the balance of the issues that are being raised in the litigation in this court. While there is the difference of a party, Nolan Thomas, LLC, none of the facts or issues raised and presented in this court are different from those that were presented, or could have been presented, in the Federal Court.

These elements of res judicata have been met and are, therefore, a bar to presenting the issue in this case.

The court also notes it is not making any determination of the merits of plaintiff's claims. To the extent plaintiff's claims were decided they cannot be reasserted based on the doctrine of res judicata. If plaintiff was wronged (which possibility is acknowledged in the opinion) the available remedy to Nolan was to appeal that adverse ruling of the court as to summary disposition or the amendment of his complaint, i.e. to allege a cause of action against the LLC or a count under the Michigan Limited Liability Act. Plaintiff's failure to appeal does not create a right to file suit in State Court alleging essentially the same acts against the same parties or their privies that was previously adjudicated in Federal Court.

For all the above reasons, defendant's motion for summary judgment pursuant to MCR 2.116(C)(7) is granted; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 6/7/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: